IN THE HIGH COURT OF DELHI AT NEW DELHI

CM(M) No. 996/2006

Judgment delivered on: September 20, 2007

Mrs. Priyanka Batra ... Petitioner
Through: Mr. Pradeep Bakshi with
Mr.Manwal Chaudhary, Advs.

versus

Shri Sandeep Grover ..... Respondent
Through: Mr. Dinesh Goyal, Adv.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR,

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

KAILASH GAMBHIR, J. Oral:

The present petition is directed against the order dated 1st July, 2007 passed by the Appellate Court. The short and interesting point involved in the present petition is as to whether the First Appellate Court hearing an appeal against the dismissal of an interim application under Order 39 Rules 1 and 2 can also

examine and look into the maintainability/non-maintainability of the suit itself on the ground that it lacked pecuniary jurisdiction to entertain the plaint itself. Mr. Pradeep Bakshi, learned counsel appearing for the petitioner urges that the First Appellate Court could not have travelled beyond the controversy as was involved in the appeal impugning an order passed on the application under Order 39 Rules 1 and 2 CPC. Counsel further contends that the issue of return of plaint in the suit as envisaged under Order 7 Rule 10 CPC could only be decided by the Court of first instance trying the said suit i.e. Trial Court and not by the Appellate Court and, therefore, the directions given to this effect by the Appellate Court are ex facie illegal. Counsel has placed reliance on the judgment of this Court reported in **1973** (**9) DLT 377 titled Ram Babu and Anr. Vs Jaswant Singh** and also another judgment of the Hon'ble Supreme Court reported in **1995 Supp (1) SCC 244 titled Salil Kumar Roy vs Badu Devi Bhansali (Smt) & Ors**.

Mr. Dinesh Goyal, learned counsel appearing for the respondent on the other hand contends that the appeal being in continuation of the suit, therefore, the Appellate Court can exercise all the powers as available to it as laid down under Order 41 CPC. The counsel placed reliance on Order 43 Rule 2, which

deals with the procedure for trying the appeals under interlocutory orders. For better appreciation of his contention the said provision is reproduced as under:-

> "43(2) **Procedure**- The rules of Order XLI shall apply, so far as may be, to appeals from orders."

The contention of the counsel for the respondent is that once Order 41 applies to the interlocutory order, then Rule 33 of Order 43 comes to the aid of the respondent, under which the Appellate Court can pass any order or further orders as the case may require. The counsel further contends that the issue of maintainability/non-maintainability of a particular suit goes to the very root of the matter and, therefore, it cannot be said that the Appellate Court trying an appeal even though against an interlocutory order, has no powers to examine whether the suit itself is maintainable or not. The counsel also contends that while examining as to whether there is a prima facie case or not the maintainability question can always be looked into by the first Appellate Court. Counsel thus contends that there is no illegality in the impugned order passed by the Appellate Court giving direction to the Trial Court to return the plaint in suit to the

plaintiff due to the lack of pecuniary jurisdiction.

I have heard learned counsel for the parties at a considerable length. Order 43 Rule 2 deals with the procedure and it lays down that the rules of Order 41 shall apply, which clearly implies that the same procedure as laid down for trying the appeals against final decrees and orders shall be applicable while trying appeals against the interlocutory orders as well. However, the said rule is qualified by the words “so far as may be, to appeals from orders”. The necessary consequence of the use of the said expression in the rule appears to be that the same procedure as prescribed in the order 41 shall be applicable to the appeals filed against the interlocutory orders. The said Rule 2 of Order 43 CPC only says that the procedure as prescribed in various rules under Order 41 shall apply so far as may be to the appeals from interlocutory orders, but the said rule dealing with the procedure part cannot widen the scope of the Appellate Court while dealing with an appeal against an interlocutory order in comparison to the Appellate Court dealing with an appeal under Order 41 against a final decree. Rule 2 of Order 43 has been engrafted in the manner so as to avoid insertion of similar set of rules in the said provision and, therefore, in this rule itself, similar

set of rules dealing with the procedure part as inserted in Order 41 CPC have been made applicable. The present case is squarely covered by the judgment of this Court as cited by the counsel for the petitioner i.e. **Ram Babu and Anr. Vs Jaswant Singh (Supra)** and reference in this regard is invited to para 2 of the said judgment as under:

> "2. In this revision petition by Ram Babu the first question for consideration is whether the Additional District Judge had any jurisdiction to entertain the application under Order XXIII rule 1 Civil Procedure Code. IT is common sense that an appeal is a continuation of a suit. This is only when the suit terminates in the trial court and thereafter it continues in the appellate court. This is why the powers of the appellate court are as large as the powers of the trial court in respect of the whole of the suit in an appeal of which the subject matter comp-rises the whole of the suit. But what about an appeal against an order? Orders are themselves of two kinds, namely, (A) final orders and (B) interlocutory orders. If a suit is disposed of by a final order, an appeal against a final order may cover the same subject matter as may be covered by an appeal against a decree. For, a suit may cease to be pending in the trial court after a final order. On the contrary appeal against an interlocutory order has a much more limited scope than an appeal against a decree or an appeal against a final order. The question before the Additional District Judge in the appeal was whether temporary injunction refused by the trial court should be granted to Jaswant Singh or not. In respect of that matter, the jurisdiction of the trial court had been exhausted and, therefore,

> the jurisdiction was vested only in the appellate court. For the same reason the jurisdiction of the trial court over the rest of the suit continued and no part of that jurisdiction vested in the appellate court. For, it is also common sense that the trial court and the appellate court bother do not have jurisdiction over the same matter simultaneously. Had that been so, conflicting orders by the two courts would come to be passed. A mere filing of the appeal does not operate as a stay of the suit. Much less can the filing of an appeal take away the jurisdiction of the trial court to decide the suit. In the appeal before the Additional District Judge no stay order seems to have been passed staying the proceedings in the suit in the trial court. The Trial court, therefore, had the jurisdiction to dispose of the suit on the merits or under Order XXIII Rule 1 Civil Procedure Code if Jaswant Singh were to make an application there-under to the trial court. It must follow, therefore, the Additional District Judge did not have the jurisdiction either to dispose of the suit on merits or under Order XXIII Rule 1 Civil Procedure Code. The application under Order XXIII Rule 1 Civil Procedure Code would, therefore, be made only to the trial court and not to the appellate court."

In the said judgment this Court has clearly held that the Appellate Court has much more limited scope when trying the appeal against the interlocutory order in comparison to when trying the appeal against a final order. The same legal position has also been propounded by the Supreme Court in **Salil Kumar**

Roy vs. Badu Devi Bhansali (Smt.) & Ors. (Supra) where the Division Bench of High Court while hearing an appeal against the order of the learned Single Judge allowed an application for amendment and directed that the Single Judge has no pecuniary jurisdiction to entertain the suit. The Apex Court observed that the Division Bench of the High Court was not justified in going into question of jurisdiction specially when the said question was pending consideration before the learned Single Judge.

In view of the settled legal position, I am of the view that the Appellate Court committed an illegality by giving directions to the Trial Court to return the plaint in the suit to the plaintiff while trying an appeal against the order of the Trial Court dismissing the application of the petitioner under Order 39 Rule 1 and 2 CPC. As regards the contention of the learned counsel for the respondent that the maintainability issue can always be looked into by the first Appellate Court while hearing an appeal against the interlocutory order, I am of the view that the said objection of non-maintainability of the suit due to the lack of pecuniary jurisdiction is always available to the contesting defendant and the same can be taken up before the Trial Court.

In the light of the above discussion, the present matter is

remanded back to the first Appellate Court to rehear the matter confining itself to the issues raised by the Trial Court while dismissing the application of the plaintiff under Order 39 Rule 1 and 2.

The parties are directed to appear before the first Appellate Court on 22nd October, 2007 and till that date the interim order granted by this Court vide orders dated 7th July, 2006 shall remain in force.

September 20, 2007 **KAILASH GAMBHIR, J**
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